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Writ - Supreme Court, U. S.

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CHARLES ELIOTT COMPTON
(Signature)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1014

ROOSEVELT STEAMSHIP COMPANY, INC.,

Petitioner,

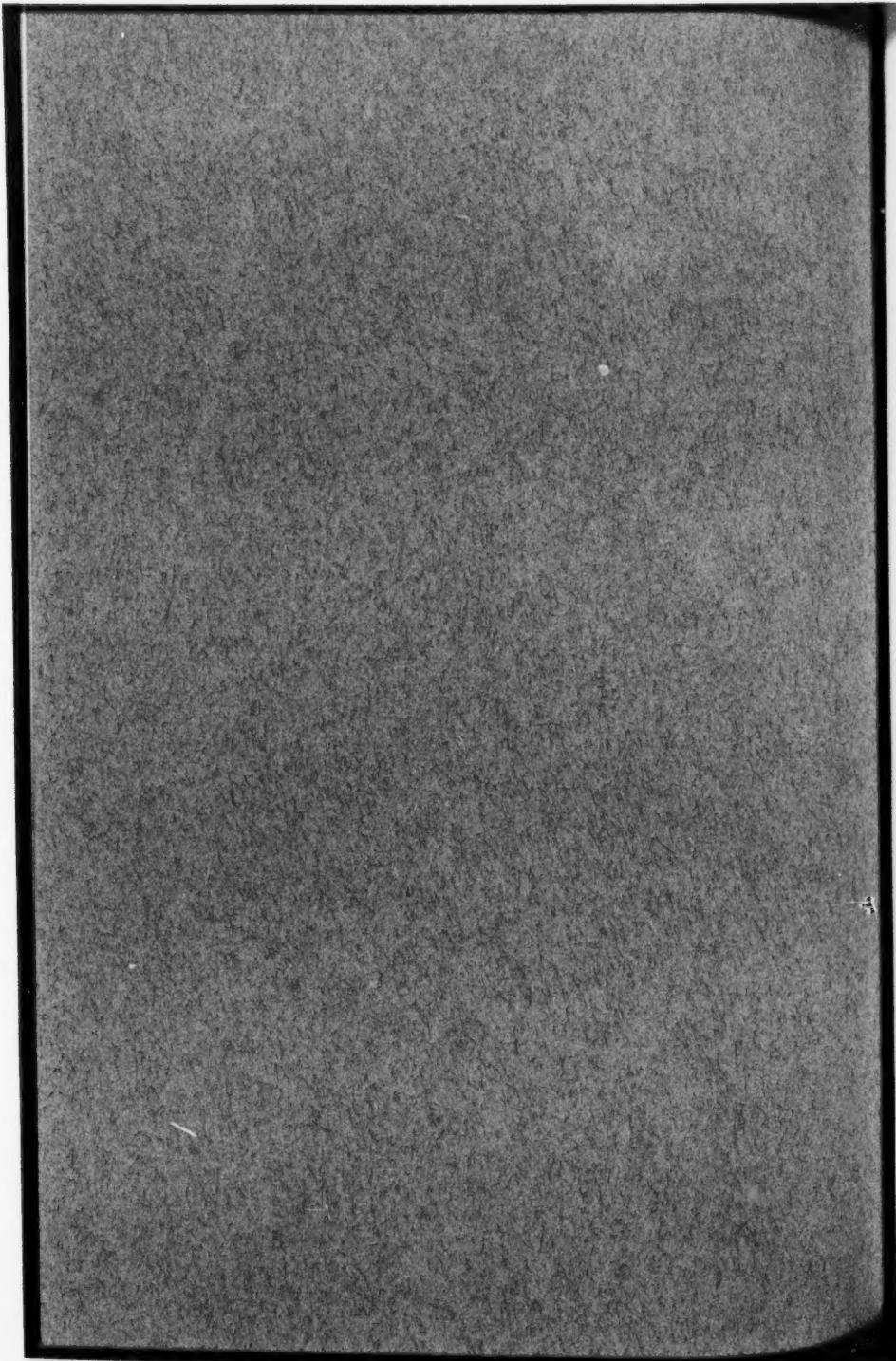
against

MARGARET M. BRADY, as Administratrix of the
Estate of JAMES P. BRADY, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT, MOTION, AND BRIEF
IN SUPPORT OF PETITION.

RAYMOND PARMER,
VERNON SIMS JONES,
Attorneys for Petitioner.



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No.

ROOSEVELT STEAMSHIP COMPANY, INC.,
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against

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Roosevelt Steamship Company, Inc., respectfully prays for a writ of certiorari to review a final order of the United States Circuit Court of Appeals for the Second Circuit, entered on April 15, 1943, which affirmed a judgment of the District Court of the Southern District of New York in favor of respondent, Margaret M. Brady, as administratrix of the estate of her husband, for \$22,760.00 as damages

on account of his death by wrongful act (R. 134, C. C. R. 168).*

This case was before this court previously on the petition of the respondent. On that occasion this court reversed the decision of the Circuit Court of Appeals, which had dismissed the complaint on the ground that the respondent's exclusive remedy was against the United States of America under the Suits in Admiralty Act.

Margaret M. Brady, as administratrix, petitioner, v. Roosevelt Steamship Company, Inc., respondent, No. 269, October Term, 1942, decided January 18, 1943.

In so reversing the decision of the Circuit Court, this court said:

"We hold that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for damages for his maritime tort. Whether a cause of action against respondent has been established is, of course, a different question as the issues involved in *Quinn v. Southgate Nelson Corp., supra*, indicate. The Circuit Court of Appeals did not reach that question. Accordingly we reverse the judgment and remand the cause to it."

Thereafter, and on March 29, 1943, the administratrix moved in the Circuit Court to affirm the judgment of the District Court in her favor on the ground that the point as to the existence of a cause of action was not any longer open by reason of the alleged abandonment of the point

* Here, as elsewhere in the petition and brief, the first citation (R. 134) is to a page of the transcript of record as printed in the Supreme Court. The second citation (C. C. R. 168) is to a page of the transcript of record as printed in the Circuit Court, to which have been added the insets showing the subsequent proceedings. This is by reason of the fact that only five of the Supreme Court records are now available.

by Roosevelt Steamship Co., Inc., on the previous hearing of the appeal (R. 124-129, C. C. R. 158-163).

The Circuit Court, however, did not agree with this contention. But it did summarily affirm the judgment below on the authority of its previous decision in *Quinn v. Southgate Nelson Corp.*, 121 F. (2d) 190 (R. 129, C. C. R. 163). The Circuit Court did not receive briefs nor hear argument with respect to the validity of that decision, nor with respect to its applicability to the present case (R. 134; C. C. R. 168).

STATEMENT OF THE CASE.

The death for which the judgment below was rendered was caused by the breaking of the rung of a ladder. The ladder was not owned by the petitioner. It was owned by the United States* and was being used by a customs inspector, an employee of the United States, who was using it in order to get aboard the *S. S. Unicoi*, a vessel owned by the United States, on which he had duties to perform (R. 63, 21, 53, 56, 72; C. C. R. 84, 28, 73, 76, 93).

The only connection which petitioner had with the death was by reason of its contract with the United States to perform certain services for the United States (R. 21-32; C. C. R. 28-43). That contract was sanctioned by a statute which provided as follows (R. 22; C. C. R. 29):

*** * * All vessels transferred to the Commission by this chapter, and now being operated by private operators on lines in foreign commerce of the United States, *shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as*

* Here, as elsewhere in the brief, the United States, rather than its political subdivision, United States Maritime Commission, is referred to as the owner.

the Commission may deem advantageous, * * *"
(46 U. S. C. 1194). (Italics ours.)

"* * *, That *the Commission may operate the line* until conditions appear to be more favorable for a re-offering of the line for private charter" (46 U. S. C. 1197 e). (Italics ours.)

This statute, as its words declare, contemplated that the United States should operate its own vessels, and, therefore, that "private operators" should not operate them, except in the special sense of rendering services to the United States, which was to be the actual operator. Such private persons or corporations as might render such services to the United States were accurately described as "private operators" only so far as their own separately conducted shipping business was concerned. However, when working for the United States, as provided in the contract, they ceased to be "private operators" and became and were referred to, specifically, as, "Managing Agents" (R. 21; C. C. R. 28). For the purpose of the business carried on pursuant to the contract the United States was the sole entrepreneur. The "Managing Agent" was merely a servant of the United States, acting in a supervisory capacity, so far as actual operation of the vessels was concerned.

The contract which the petitioner made with the United States recited that it was made pursuant to the above mentioned statute (R. 22; C. C. R. 29). Some of the important provisions of the contract, as already noted by this court, were as follows:

(1) Petitioner was designated as a managing agent for the Commission as owner "to manage, operate and conduct the business of the Line * * * for and on behalf of the Owner and under its supervision and direction" (R. 22; C. C. R. 30).

(2) Petitioner agreed "to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe" and "to conduct its operations with respect to the vessels * * * in full compliance with the applicable provisions of law" (R. 25; C. C. R. 33).

(3) Petitioner agreed "subject to such regulations or methods of supervision and inspection as may be required or prescribed" by the Commission to "exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair covering hull, machinery, boilers, tackle, apparel, furniture, equipment and spare parts" (R. 26; C. C. R. 36).

(4) Respondent did not share in profits but was entitled to reimbursement for expenses under a provision of the contract which stated that "The owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement" (R. 29; C. C. R. 39).

Other important provisions of the contract were as follows:

(5) The contract set forth that *operation by the United States* was intended (R. 22; C. C. R. 29). This was in accordance with the statute and meant that the managing agent was not to operate the vessels, except in the limited sense of performing services in the operation of the vessels for the United States (R. 22; C. C. R. 29).

(6) The contract provided that the operation should be *in the name of the United States*, i. e. in the name of "American Pioneer Line", a trade name belonging to the United States (R. 24; C. C. R. 32).

(7) The contract provided that the United States should bear all the expenses. The expenses were of two kinds. First, there were the expenses of *operation of the vessels* (R. 24, 25; C. C. R. 33). Second, there were the expenses for *overhead*, in which would be included the expenses of the managing agent's shore organization, so far as the employees of that organization devoted their services to the operation of vessels owned and operated by the United States (R. 29, 30, 20; C. C. R. 39, 40, 27).

The only evidence of negligence on the part of anyone was the evidence that a defective ladder was furnished to the deceased by certain unidentified members of the crew of the *S.S. Unicoi* (R. 62-64; C. C. R. 83-85). This occurred while the vessel was docking at the end of a voyage (R. 62, 65, 16, 19; C. C. R. 83, 85, 23, 26). It was only because a long voyage was ending that the deceased, a customs inspector, had to go on board the vessel. But there was no evidence that this ladder had become defective or was furnished in a defective condition to the deceased through the neglect by the petitioner of any of the duties which it had assumed to perform pursuant to the provisions of the contract. Specifically, there was no evidence that petitioner had failed in its undertaking to equip the vessel properly, or in its obligation to act "in full compliance with applicable provisions of law" or "to exercise reasonable care in maintaining the vessel and its equipment in a thoroughly efficient state of repair" (R. 25, 26; C. C. R. 33, 34, 36). True, the ladder was defective *at the end of the voyage* and was negligently furnished by the crew to the deceased *at that time*, but that did not mean that the petitioner was responsible either for the defect or for the negligent act of furnishing the ladder in its then defective condition.

On the limited amount of evidence of negligence in the record below, it was inferable merely that the ladder had

become defective *at some time*, but whether it was defective before the voyage began, which was the only time when the shore employees of the petitioner would have had an opportunity to discover the defect and to remedy it, or whether it became defective during the voyage, when petitioner's shore employees would have had no such opportunity, did not appear by testimony or permissible inference. Furthermore, there was nothing in the evidence to show how far the petitioner's duty to use reasonable care was qualified by such regulations as to methods of supervision and inspection as the United States had prescribed, pursuant to the provisions of the contract which permitted it to do so (R. 26; C. C. R. 36).

No doubt, for its personal negligent failure to perform such duties as devolved on petitioner by reason of its contract with the United States, it would be liable, but here the negligence which was proved was not of that kind. It was negligence of the crew and nothing else.

In view of this, the only liability arising from the death, so negligently caused, rested on those members of the crew who had failed in their duties and on the employer of the crew.

The vital question, therefore, was whether or not Roosevelt Steamship Company, Inc., which was being sued, employed the crew. Unless it did, no cause of action was proved against it.

Only two items of evidence were offered in an attempt to prove that the crew was employed by petitioner. The first was the testimony of a vice-president of Roosevelt Steamship Company, Inc. (R. 52-55; C. C. R. 72-75; Rules of Civil Procedure, 26, D, 4). The second was the written contract between United States of America and Roosevelt Steamship Company, Inc., already referred to (R. 21-32; C. C. R. 28-43).

Neither of these items of evidence proved that Roosevelt Steamship Company, Inc., employed the crew. Each item proved the contrary. The testimony of the vice-president was that Roosevelt Steamship Company, Inc., did *not* hire the crew. They were hired by the United States (R. 54, 55; C. C. R. 74, 75). The written contract did not provide that Roosevelt Steamship Company, Inc., was the employer of the crew. It provided only that Roosevelt Steamship Company, Inc., should "man, * * * the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and (should) certify or approve for payment by the Owner the true cost thereof" (R. 25; C. C. R. 33). This meant that the United States, as the operator, was to pay the cost of manning the vessels, *i. e.*, the wages of the crew, and that Roosevelt Steamship Company would perform the service of furnishing the men.

In this state of the evidence, petitioner moved, both at the close of the respondent's case and at the close of the entire case, to dismiss the complaint on the ground that there had not been any proof of negligence "on the part of this defendant or on the part of any person for whom this defendant would be legally responsible" (R. 83; R. 103; C. C. R. 106, 133). In so moving, petitioner asked the court to declare that, *as a matter of law*, the members of the crew, who were the only persons whose negligence had been established, were not the servants of the petitioner. The motions were denied, and exceptions were taken (R. 83, 103; C. C. R. 106, 133). The District Court ruled that, *as a matter of law*, petitioner was the employer of the crew, and based this ruling on the case of *Quinn v. Southgate Nelson Corporation*, 121 Fed. (2d) 190 (1941); (R. 97; C. C. R. 126). The testimony of petitioner's vice-president that petitioner did not employ the crew was disregarded. The only thing which the court left to the jury

to decide was whether there had been negligence (R. 104-109; C. C. R. 134-140).

After a verdict by a jury, judgment was entered against Roosevelt Steamship Company, Inc., in the sum of \$22,760 (R. 111, 112; C. C. R. 142, 144). This judgment has now been affirmed by the Circuit Court solely on the authority of its previous decision in the *Quinn* case (R. 129; C. C. R. 163). The effect of the decision, therefore, is that the operating contract in and of itself conclusively establishes that the Managing Agent is the employer of the crew. Any evidence to the contrary is to be disregarded.

Petitioner now seeks certiorari to review this decision of the Circuit Court.

JURISDICTION.

The jurisdiction of this court to entertain this petition and to grant the same is provided by Section 347a of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. What is the status, as respects the employment of the crew of a United States owned vessel, of a person or a corporation who agrees, as agent for the United States, to perform services for the United States in the operation of the vessel, whether he be a "Managing Agent", as in the contract involved in the case at bar, or a "General Agent", as in the modified contract currently used by the War Shipping Administration?*

* Notwithstanding that the War Shipping Administration has substituted the current General Agency agreement for the contract involved in the case at bar, one of the purposes of which was to clarify the status of the agent as a non-employer of the crew, the agent's status is still in question and is being questioned extensively in current litigation. Seemingly, it was because it was realized that the status of the agent under the General Agency agreement was

2. Is such status of the agent a matter which can and should be stated as a matter of law, or is such status a factual matter, which must be permitted to depend for solution on a finding of fact in each case, with accompanying variation in the result from case to case?

3. If such status of the agent can and should be stated as a matter of law, is the agent the sole employer of the crew or is the United States the sole employer of the crew?

OPINIONS BELOW.

Neither the District Court nor the Circuit Court rendered an opinion with respect to the questions here involved. Both courts stated that they were governed by the decision in the case of *Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190 (1941), cert. den. 314 U. S. 682 (R. 97, 129; C. C. R. 126, 163).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with the decision in the case of *City of Los Angeles v. Los Angeles Pacific Navigation Co., et al.* (1927 A. M. C. 778; 84 Cal. App. 413) and with the rationale of the decision in the case of *New York & Cuba Mail Steamship Company v. United States* (Opinion by Judge Hough) 12 F. (2d) 348 (1926); cert. denied 273 U. S. 719.

2. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. That is, its decision is at vari-

still questionable, in view of the decisions in the *Quinn* case and in the case at bar, that the Solicitor General, on the previous argument in this case, handed to the court copies of the General Agency agreement and, in effect, asked this court not to do anything which would affect the status of the agent as that document attempted to define it, i. e., as a non-employer of the crew. Compare *Memorandum for the United States as amicus curiae*, in No. 269, October Term, 1942, pages 4-5. Some of the important provisions of the General Agency agreement are set forth in the note on page 11 of this brief.

ance with familiar principles of agency as set forth in Restatement of the Law of Agency, in decisions in New York and other states, and in the decision of this court in *Standard Oil Co. v. Anderson*, 212 U. S. 215.

3. The decision of the Circuit Court in the present case, together with its previous decision in the case of *Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190, has led to confusion and uncertainty respecting the status of agents of the United States in the operation of vessels. This confusion and uncertainty is a present and growing source of what may prove to be useless and wasteful litigation. Notwithstanding the War Shipping Administration's modification of the contract with the agents so as to indicate plainly that it is the intention of the parties to the contract that the United States is the employer of the crew,*

* The General Agency agreement is set forth in full at Fed. Reg. v. 7, pp. 7561, 7562. Among other things, it provides:

"ARTICLE 1. The United States appoints the General Agent as its agent and *not as an independent contractor*, to manage and conduct the business of vessels assigned to it by the United States from time to time."

"ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(d) The General Agent shall *procure* the Master of the vessels operated hereunder, subject to the approval of the United States. *The master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall *procure* and *make available* to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be *procured* by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. *The officers and members of the crew shall be subject only to the orders of the Master.* All such persons shall be paid in the customary manner with funds provided by the United States hereunder." (Italics ours.)

actions are being instituted against the agents on the theory that the decisions in the *Quinn* case and in this case require a holding that the agent, nevertheless, is the employer of the crew.*

Moreover, if the *Quinn* case and the case at bar were rightly decided, these new actions are brought properly

* The following is a list of some of the cases now pending wherein the agent has been sued as the employer of the crew, notwithstanding the provisions of the General Agency agreement which indicate that the agent is not the employer. There are many others.

A. UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

1. Mary Hagerup as Administratrix, plaintiff *against* A. H. Bull & Co., defendant, Civ. 20-431.
2. Edwin C. Robinson, plaintiff *against* A. H. Bull & Co., defendant, Civ. 21-80.
3. Carlos deLuz, plaintiff *against* Lykes Brothers Steamship Co., defendant, Civ. 20-551.
4. William Morris, plaintiff *against* Lykes Brothers Steamship Co., defendant, Civ. 20-595.
5. Peter J. Hyde, plaintiff *against* Lykes Brothers Steamship Co., defendant, Civ. 20-534.
6. Rudolph Klaas, plaintiff *against* United States Lines Company, defendant, Civ. 21-129.
7. Flavio A. deQueiroz, plaintiff *against* Waterman Steamship Corporation and Waterman Steamship Agency, Ltd., defendants, Civ. 21-30.
8. Phillip Wold, plaintiff *against* Waterman Steamship Corporation and Waterman Steamship Agency, defendants, Civ. 21-90.
9. Juan Natal, plaintiff *against* Agwi Lines, Inc., defendant, Civ. 20-292.
10. Karl Karlstrom, plaintiff *against* Lykes Bros. Steamship Company, defendant, Civ. 19-597.
11. Fernando Torres, plaintiff *against* United Fruit Co., defendant, Civ. 20-493.
12. Samuel Engleson, plaintiff *against* Waterman Steamship Co., and Waterman Steamship Agency, defendants, Civ. 19-468.

B. UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

1. Max C. McLean, plaintiff *against* Lykes Brothers Steamship Company, Inc. and United States of America, in Admiralty.

against the agents, notwithstanding the changes in the wording of the agency contract, which declare, in effect, that the crew are employees of the United States. *Actually, the agents are now performing the same services which they have always performed.* If regard is to be had to substance, rather than to form, nothing has been or can be accomplished merely by labeling the United States as the employer in a new form of contract in the making of which third parties (tort victims) have not participated.

However, if the *Quinn* case and the case at bar were wrongly decided, the United States is the employer of the crew and the agent is not.* There is then no conflict between

C. UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

1. James W. Street, plaintiff *against* American Mail Line and War Shipping Administration, Admiralty No. 14391. In this case it has been decided that the agent is NOT the employer, *i. e.*, he is not liable for the seaman's maintenance and cure.

D. UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF PENNSYLVANIA.

1. Thomas Burnett Jenkins *against* Lykes Bros. Steamship Company, *et al.*, Civ. 2543.

2. Lloyd Thomas *v.* American Hawaiian Steamship Company, Civ. 3038.

* Under the agency agreement involved in this case and under the General Agency agreement, it is not possible that *both* the United States and the agent are employers of the crew. The venture is not joint. It follows that if one of them is the employer, the other is not.

The suggestion in the opinion in the *Quinn* case that the United States and its agent might both be liable for the same tort was and is true, but irrelevant. It does not follow that, because two persons may be liable for the same tort, both are the employers of the person who committed it. Though not present here, there are other grounds of tort liability than respondeat-superior. Therefore, the fact that one or more persons are liable proves nothing with respect to the kind of liability involved or with respect to the existence of the master and servant relationship between the person liable and the person who committed the tort. Evidence of the existence of such a relationship must be found elsewhere.

the actual master and servant relationship and the intention of the parties as expressed in the contract.

Much litigation has already arisen, and will in the future arise, as a result of the operation of merchant vessels by the War Shipping Administration through the agency of private persons and corporations. If seamen and other persons, whose rights to recover damages depend on the existence of a master and servant relationship, have rights only against the United States, it is important that they should know this at an early date, instead of being permitted to pursue the agent unwisely, and, when the statute of limitations has passed, being then informed of their mistake.

It is also important that misdirected and, therefore, useless litigation be prevented. The problem of "whom to sue" when the crew of a government-owned vessel negligently causes damage has been awaiting final decision for years. The great extension of the United States interest in shipping which has been brought on by the war has made the problem one which cries for final solution in the present.*

* The Act of March 24, 1943, Chap. 26, Public Law 17, which makes the United States liable in admiralty to "members of crews employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration" does not and will not solve the problem. This is because the statute leaves unanswered the question of whether the members of the crew referred to therein are employees of the United States or employees of the General Agent. A seaman who wants a jury trial will not accept the benefits of this statute; instead he will sue the General Agent, contending that the General Agent is the employer and, in support of that contention, he will cite, and rightly, the decisions in the *Quinn* case and in the *Brady* case.

Even the Senate Committee on Commerce in reporting the bill regarded the employment of such seamen by the United States as merely "technical". Cf. Senate Report No. 62, Feb. 22, 1943.

Furthermore, the statute leaves entirely untouched those cases where United States vessels have collided negligently with docks or other land equipment and have caused great damage. For such

The present case provides an appropriate occasion for clarifying the status of all agents who have been and are engaged in the important work of assisting the United States in the operation of vessels.

Respectfully submitted,

ROOSEVELT STEAMSHIP COMPANY, INC.,
Petitioner.

By RAYMOND PARMER,
VERNON SIMS JONES,
Attorneys for Petitioner.

non-maritime damage the United States has not yet consented to be sued. Such a situation leads directly to suits against the General Agents on claims that the negligent crews are their servants. Cf. *The Bell Telephone Co. of Pennsylvania, Libellant, against United States of America, Respondent*, 1943 A. M. C. 220, not elsewhere reported; now in the Circuit Court of Appeals for the Second Circuit; sub. nom. *In the Matter of the petition of United States of America for a writ of prohibition against the Honorable Mortimer W. Byers, etc.*

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ROOSEVELT STEAMSHIP COMPANY, INC.,
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against
MARGARET M. BRADY, as Administratrix
of the Estate of JAMES P. BRADY,
deceased,
Respondent.

MOTION.

ROOSEVELT STEAMSHIP COMPANY, INC., the petitioner herein, moves that the certified record in *Margaret M. Brady, as administratrix of the Estate of James P. Brady, deceased, petitioner, against Roosevelt Steamship Company, Inc., respondent*, No. 269, October Term, 1942, be considered and used as part of the record on the foregoing petition for a writ of certiorari.

Respectfully submitted,

RAYMOND PARMER,
VERNON SIMS JONES,
Attorneys for Petitioner.

